**BORHANUDDIN JANTARA & ANOR**

**v.**

**AMERICAN INTERNATIONAL ASSURANCE CO. LTD.**

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP, GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 229 OF 1985]
19 FEBRUARY 1986

***CONTRACT:*** *Whether there was a concluded contract - Life insurance policy - Whether accepted by the insurance company - Construction of policy - Terms of receipt issued - Whether payment was first premium - Time of signing and time of payment - Contra proferentum rule - One party's performance - Refusal of payment - Valid grounds - Breach of contract.*

***INSURANCE:*** *Life insurance policy - Whether formed conclusively - Construction of terms - Payment whether premium - Acceptance - Refusal to pay - Breach of contract.*

The deceased was one of the victims of the MAS flight No. MH 653 which crashed at Tanjong Kupang, Johor on 4 December 1977. About two weeks before the crash, on 21 November 1977, the deceased submitted a proposal form duly completed and signed by her to the respondents (insurance company) to insure her life for a sum of RM50,000 with an additional accident benefit of another sum of RM50,000. On 2 December 1977, the deceased paid to the insurance company a cash sum of RM118 and a receipt was issued by the insurance company. The insurance company did not issue a policy number to the deceased although an allotted number was carried in the proposal form and receipt.

The estate of the deceased sued the insurance company for the assured sums when the latter refused to pay. The insurance company contended that there was no concluded contract since no policy was as yet issued or delivered. In reply, the estate of the deceased contended that the deceased's proposal was accepted by the insurance company when the payment of RM118 was accepted. V.C. George J agreed with the submission of the insurance company on the construction of the terms in the proposal form and the receipt. The estate of the deceased then appealed to the Supreme Court.

The question to be decided in this appeal was whether, *inter alia*, a contract of life insurance had been formed.

**Held:**

**[1]** It is not necessary to consider whether the terms of the receipt were part of the contract or not for the following reasons:

(a) The cash payment of RM118 was payment of a premium as there was no question of fee or deposit involved. Also, it must be the first premium because there was no other payments preceding it and

(b) for the terms of the receipt to be applicable, according to declaration (c) of the proposal form, the premium paid in cash must be so paid at the time of signing of proposal form and the conditional receipt therefore must also be issued at the same time. This requirement is clearly spelt out in the proviso to condition (c). In cases of this nature, the *contra proferentum* rule must apply. (*John Lee and Son (Grantham) Ltd. & Others v. Railway Executive* [1949] 2 All ER 581 and *Adams & Others v. Richardson & Starling Ltd.* [1969] 1 WLR 1645 applied).

**[2]** Since the proviso to declaration (c) does not apply and therefore the conditions of receipt are not applicable to this case, what remains of declaration (c) is that the asurance shall not take effect until a policy is issued and delivered to the deceased and the first premium therefore was actually paid in full in her lifetime and good health. Even this portion of declaration (c) is also rendered irrelevant by the payment of the first premium on 2 December 1977.

**[3]** The deceased had performed her part of the bargain by paying the first premium and thereafter, it became the duty of the insurance company to issue and deliver a policy to her. The insurance company cannot refuse to do it altogether unless there are valid grounds for so doing. Here, there were no such grounds. In fact, a policy number had even been already allotted and had it not been for the premature death of the deceased which occurred two days after the first premium was paid, the policy would have been issued and delivered. In addition, the proposal was never rejected by the insurance company.

**[4]** There was a contract of assurance concluded when the insurance company accepted payment of the premium from the deceased on 2nd December 1977 and by refusing to make payment of the assured sums the insurance company was acting in breach of the contract.

*[Appeal allowed with costs.]*

**Cases referred to:**
*John Lee and Son (Grantham) Ltd. & Ors. v. Railway Executive [1949] 2 All ER 581*
*Adams & Ors. v. Richardson & Starling Ltd. [1969] 1 WLR 1645*

*For the appellants - Mohammad Yacob Karim (Kassim Salleh with him); M/s. Yacob & Rakan-Rakan*
*For the respondents - T. Thomas; M/s. Skrine & Co.*

**JUDGMENT**

**Salleh Abas LP:**

The question to be decided in this appeal is whether a contract of life insurance was formed, or simply whether there was an acceptance by the respondents.

The facts which gave rise to this issue are as follows:

One Azian Bte Borhanuddin (deceased) was a flight stewardess employed by Malaysian Airline System (MAS). On 4 December 1977 she was on duty in MAS flight No. MH 653 which crashed at Tanjong Kupang, Johor. All persons on board, including Azian were killed.

However, about two weeks before the crash on 21 November 1977 the deceased submitted a proposal form duly completed and signed by her to the respondents proposing to insure her life for a sum of RM50,000 with an additional accident benefit of another sum of RM50,000. The proposal form ended with a declaration containing a number of paragraphs, one of which-which is material to the appeal - is para. (c) and is as follows:

> The assurance herein applied for shall not take effect unless and until a policy is issued and delivered to me on this application and the first premium thereon actually paid in full during my lifetime and good health, provided, however, that if any payment of premium is made in cash at the time of signing this application and a conditional receipt issued therefor, the terms of the receipt shall apply hereto and are agreed to.

Subsequently on 2 December 1977 the deceased paid to the respondents a cash sum of RM118 and the receipt issued by the respondents made no reference to it as being either a deposit or a premium. However, like the proposal form, the receipt also contained a condition printed on its reverse side as follows:

**Conditions of Payment**

Said sum is received only for the account of the Payor and the Company is in no way committed thereby to the acceptance thereof for the purpose offered nor to any action in the premises and nothing herein or connected with the receipt of said sum shall be held to waive default in payment of any premium, interest or other sum due, or to extend the time for payment of any premium interest or other sum or in any manner to affect the rights of the Company under any policy or contract of assurance or with respect to any application submitted to the company for group or individual assurance or otherwise. If the said amount be not accepted by the Company for the purpose offered it will be returned to the Payor in the usual course of business.

Any payment tendered otherwise than in cash is received for the account of the Payor, subject to collection and the receipt of actual payment by the Company.

Two days after making her cash payment she died in the crash and presumably because of her premature death the respondents did not issue any policy to her although a policy number, i.e. R55-2055202 appeared to have been allotted by being carried in the proposal form and the receipt.

When sued for the assured sums the respondents relied upon declaration (c) and maintained that there was no contract concluded, there being no policy issued and delivered as yet. In reply to this contention, the estate of the deceased contended that the deceased's proposal was accepted by the respondents when they accepted payment of RM118 from the deceased, the condition printed on the reverse side of the receipt being a noncontractual document and therefore not binding. George J overruled the submission and held that since the proposal was subject to declaration (c) and as this declaration contained a reference to the application of "terms of the receipt", the acceptance of the RM118 cash payment by the deceased must be subject to these conditions, and that consequently there could not be a waiver of the understanding between the deceased and the respondents as to the commencement of the assurance, which was to take effect only after a policy was issued and delivered and the first premium paid during her life time and good health.

With respect we differ from the view taken by the learned Judge. For the purpose of this judgment it is not necessary for us to go so far as to consider whether the conditions (also described as the terms) of the receipt were part of the contract, or not. Even assuming that they are so and therefore binding in the circumstances of this case they are immaterial because of two reasons. In the first place the cash payment was according to PW1, the life underwriter employed by the respondents, payment of a premium. Certainly the deceased must have intended it to be the first premium as no question of fee or deposit was ever involved. That being so, it must be the first premium because there was no other payments preceding it. Secondly for the conditions (terms) of the receipt to be applicable, according to declaration (c) the premium paid in cash must be so paid at the time of signing the proposal form and the conditional receipt therefor must also be issued at the same time. This requirement is clearly spelt out in the proviso to condition (c) as follows:

provided, however, that if any payment of premium is made in cash **at the time of signing this application and a conditional receipt issued therefor,** the terms of the receipt shall apply hereto and are agreed to.

Now what happened in this case? The premium was paid in cash, but it was not paid on the date of the signing of the proposal, which was on 21 November 1977. It was only paid on 2 December 1977. Again the receipt therefor was not contemporaneous with the signing of the proposal form i.e. the application. Thus it is clear that the conditions (or the terms) of the receipt are not applicable. Clearly it was envisaged by the proviso to declaration (c) that the conditions or terms of the receipt would be applicable only when both the cash payment of the premium and the issue of the receipt therefor were contemporaneously made. The proposal form and the conditions of the receipt seeking to exempt the respondents were not drawn up by the deceased but by the respondents. Therefore in cases of this nature *contra proferentum* rule must apply. See *John Lee and Son (Grantham) Ltd. & Others v. Railway Executive and Adams* [1949] 2 ALL ER 581 *& Others v. Richardson & Starling Ltd* [1969] 1 WLR 1645 at 1653.

Now since the proviso to declaration (c) does not apply and therefore the conditions of receipt are not applicable to the case, what is left of the declaration (c) is that the assurance shall not take effect until a policy is issued and delivered to the deceased and the first premium therefore was actually paid in full in her lifetime and good health. Even this portion of declaration (c) is also rendered irrelevant by the payment of the first premium on 2 December 1977.

The deceased had performed her part of the bargain by paying the first premium on 2 December 1977 whilst she was still alive. But was it paid during her good health? The answer to this question must be in the affirmative because according to PW1's evidence the deceased was exempted from the requirements of a medical check-up. There was nothing left for the deceased to do before the respondents could issue and deliver the policy. This responsibility is not that of the deceased but that of the respondents. In other words the moment the deceased had performed her part of the bargain by paying the first premium, it became the duty of the respondents to issue and deliver a policy to her. The respondents may take time to do it, one month or even six months, but they cannot refuse to do it altogether unless there are valid grounds for so doing. In this case there are none. In fact a policy number had even already been allotted and had it not been for the premature death of the deceased which occurred two days after the first premium was paid, the policy would have been issued and delivered. The proposal was never rejected and all that the respondents did was that they instructed PW1 not to issue the policy and refused payment of the assured sums.

In this situation the law will not allow the respondents to escape liability by refusing to perform their obligation. In our view the contention by counsel for the appellants is well founded in that there was a contract of assurance concluded when the respondents accepted payment of the premium from the deceased on 2 December 1977 and by refusing to make payment of the assured sums the respondents were acting in breach of the contract.

We therefore allow the appeal with costs both here and in the Court below and direct that the judgment of the Court below be set aside and that the respondents do pay the sum claimed together with interest at 8% per annum from the date of the judgment of the Court below till realisation. We also order that the deposit of this appeal be refunded to the appellants.

Also found at [1986] 1 CLJ 532